PP

v.

MOHD NAZRUL SHUHAIMI

HIGH COURT MALAYA, TEMERLOH
AKHTAR TAHIR JC
[CRIMINAL TRIAL NO: 45-1-2007]
20 AUGUST 2009

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Prima facie - Whether established - Direct evidence - Whether sufficient to draw an inference that accused killed deceased - Cumulative circumstances of case - Whether appointed to accused committing the crime - Non-production of weapon used - Whether further weakens prosecution's case - Failure to call material witness - Evidence Act 1950, s. 114(g) - Whether invoked - Whether prosecution failed to prove prima facie case against accused*

The accused was charged under s. 302 of the Penal Code with the murder of one Noraini Binti Umar ('deceased'). The facts were that on 2 September 2006, at about 4.30 in the evening, SP6 and the deceased were riding on a motorcycle when they saw the accused chase them on the road. SP6 then felt someone kicking her motorcycle causing both her and the deceased to fall off. They were then confronted by the accused. An argument ensued, the subject being the relationship between the accused, the deceased and SP6. SP6 wanted the accused to choose between her and the deceased whereby the accused said he wanted both of them and at the same time accused them of being unfaithful to him. The accused then took out a knife saying that he wanted to kill both of them. SP6 and the deceased both ran with the accused chasing after them. SP6 was running in front whereas the deceased was at the back. When SP6 turned back she saw the accused pouncing on the deceased and hugging the deceased from the back. SP6 testified that that was the last she saw of the incident as she fled and hid herself. When she came out of hiding, she saw the deceased lying sprawled on the road, bleeding and almost lifeless. The deceased was taken to the hospital where she died. The doctor who conducted the post mortem on the deceased (SP7) detected 18 injuries on the deceased but confirmed that the cause of death were the two stab wounds in the neck. The Investigating Officer (IO) testified that a knife was recovered and was sent to the chemist along with items of clothing of the accused for analysis. However, none

of the items sent were tendered as evidence. The issue that arose was whether there was sufficient evidence to draw an inference that the accused killed the deceased bearing in mind the provisions of s. 300 Penal Code.

Held (discharging and acquitting the accused):

(1) The direct evidence herein ended when SP6 saw the accused pouncing on the deceased. The material evidence missing was whether when he pounced the knife was still in his hand. After seeing the accused pouncing on the deceased neither SP6 nor any other witnesses saw the actual incident which led to the 18 injuries on the deceased. To constitute murder the intention or knowledge that the act would lead to the death was necessary. In order to determine intention or knowledge there must be some evidence to show how the said act leading to the death took place. Here there was total absence of evidence as to how the act took place and whether it was the accused who actually committed the act. Thus, it could not be said for certain that the cumulative circumstances of the case pointed to the accused having committed the crime. The deceased could have suffered these injuries while struggling or even fighting back which led to the possibility that she could have been accidentally or unintentionally stabbed by the accused if at all it was the accused who stabbed her. Hence, the circumstantial evidence did not lead to the irresistible conclusion that it was the accused who murdered the deceased. (paras 13, 15, 17, 18 & 19)

(2) The weapon used for the commission of the offence was not tendered as evidence. There was the evidence of the IO that a knife was recovered but no further evidence was led to determine to establish whether this was the knife which caused the death of the deceased. It was clear from the evidence that the exact location of the knife was not shown by the accused. Further, the photographs clearly showed although this was denied by the IO that the knife had to be dug out from under the sand. If the knife was hidden under the sand, there was no evidence to show what led the police to dig that particular spot. (paras 20 & 21)

(3) The doctor conducting the post mortem had handed a number of samples to be analysed and the IO himself had seized certain item from the accused which were in fact sent to the chemist department yet the chemist who analysed the exhibits

were not called to testify and neither was there proof that the chemist report was served on the accused. This court invoked an adverse inference against the prosecution under s. 114(g) of the Evidence Act 1950. The prosecution had failed to explain the non-calling of the chemist. In the circumstances of the case, where the prosecution was relying on circumstantial evidence, the chemist had to be regarded as a material witness. (paras 22 & 24)

(4) The final nail in the prosecution's case was the failure to call the witness who identified the deceased to the doctor who conducted the post mortem. The IO testified that it was the father of the deceased who identified the deceased but he was neither called nor offered to the defence. For all intents and purposes, the identity of the deceased that was the murder victim had not been established in this case. (paras 25 & 27)

(5) The prosecution had failed to prove a *prima facie* case against the accused. (para 28)

Case(s) referred to:
Ghazalee Kassim & Ors v. PP [2009] 4 CLJ 737 FC ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***
Teay Wah Cheong v. PP [1963] 1 LNS 142 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 399
Evidence Act 1950, s. 114(g)
Penal Code, s. 300

For the accused - Ahmad Nizam Abd Hamid (Rozilan Abd Rahman with him); M/s Sazali & Lim
For the prosecution - Mohd Najmi Daud DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Akhtar Tahir JC:

[1] The charge against the accused was as follows:

Pertuduhan:

Bahawa kamu pada 2hb September 2006 jam lebih kurang 4.30 petang, di kawasan Jalan Pintas antara Simpang Jengka 5 ke Kuala Sentul, Sungai Jerik, di dalam Daerah Maran, di dalam

A Negeri Pahang, telah melakukan kesalahan bunuh menyebabkan kematian keatas Noraini Binti Umar (K/P No: 900829-06-5716), dengan cara menikam lalu menyebabkan kematian. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

B **[2]** On 2 September 2006, four friends Mohd Rashdan bin Nit @ Abdullah (SP4), Norafizah bt Muhammad (SP5), Muzalifah binti Khamis (SP6) and Noraini (the deceased) decided to go for a swim at the river at Kuala Sentul.

C **[3]** They went on two separate motorcycles one ridden by SP4 and SP5 the other ridden by the deceased an SP6. They arrived at the river at 3.20pm and stayed there until 4pm. Earlier SP6 had telephoned other friends, and amongst others the accused to follow them but the accused and others had refused.

D **[4]** At 4pm all four decided to leave the place, again on separate motorcycles as before. On the way home SP4 and SP5 decided to have a drink whereas the deceased and SP6 proceeded ahead.

E **[5]** According to SP6 while they were on the road they saw the accused and his friend by the name of Along (SP8) on another motorcycle. The accused who was riding the motorcycle chased them and SP6 then felt someone kicking her motorcycle causing both her and the deceased to fall off.

F **[6]** They were then confronted by the accused while SP8 went off from the place. There was an argument the subject being the relationship between the accused, the deceased and SP6. SP6 wanted the accused to choose between her and the deceased whereby the accused said he wanted both of them and at the G same time accusing them of being unfaithful to him.

[7] The accused then took out a knife saying that he wanted to kill both of them. SP6 and the deceased both ran with the accused chasing after them. SP6 was running in front whereas the H deceased was at the back. When SP6 turned back she saw the accused pouncing on the deceased and hugging the deceased from the back.

[8] That was the last she saw of the incident as she fled and hid herself and when she came out from hiding she saw the I deceased lying sprawled on the road with bleeding and almost lifeless.

[9] The deceased was taken to the hospital where apparently she died. There is no evidence to show where the deceased died and the police officer who brought the deceased to the doctor and identified by the doctor conducting the post mortem to be DSP Sharifuddin was not called as a witness.

[10] The doctor who conducted the post mortem on the deceased Dr Zahari bin Noor (SP7) detected 18 injuries on the deceased but confirmed that the cause of death were the two stab wound on the neck.

[11] The investigating office (IO) of this case SP9 testified that a knife was recovered in this case and the knife and items of clothing of the accused were sent to the chemist for analysis. However in this case none of the items sent were tendered as evidence although the DPP attempted to produce the chemist report through the IO.

[12] I disallowed the DPP's application as the provision of s. 399 of the Criminal Procedure Code (CPC) was not complied with. The DPP failed to prove that the chemist report was served on the accused as is required under s. 399 of CPC which provides as follows:

> 399. Reports of certain person.
>
> (1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or anlysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person or Registrar shall be required to attend as a witness:
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> (a) by the Court; or
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> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
>
> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less that ten clear days before the commencement of the trial.

A **Direct/Circumstantial Evidence**

[13] The direct evidence in this case ended when SP6 saw the accused pouncing on the deceased, the material evidence missing here is whether when he pounced the knife was still in his hand. B After seeing the accused pouncing on the deceased neither SP6 nor any other witnesses saw the actual incident which led to the 18 injuries on the deceased.

[14] Is this sufficient to draw an inference that the accused killed C the deceased bearing in mind the provisions of s. 300 Penal Code?. Section 300 Penal Code which defines murder reads as follows:

> 300. Murder.
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> D Except in the cases hereinafter excepted, culpable homicide is murder:
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> (a) If the act by which the death is caused is done with the intention of causing death;
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> E (b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
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> (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is F sufficient in the ordinary course of nature to cause death; or
>
> (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk G of causing death, or such injury as aforesaid.

[15] From the reading of this provision it is clear that to constitute murder the intention or knowledge that the act will lead to the death is necessary. To me in order to determine intention H or knowledge there must be some evidence to show how the said act leading to the death took place. Here there is total absence of evidence as to how the act took place and whether it was the accused who actually committed the act.

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[16] Apart from the provision of law guidelines to evaluate circumstantial evidence can be gleaned from the celebrated case of *Sunny Ang v. PP* [1965] 1 LNS 171 where it was decided as follows:

> It was also contended that the learned trial Judge erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. There are two passages in the summing-up which are relevant in this connection. The first passage, which comes after the direction in which the learned trial judge deals with what he refers to as the first question of the cumulative effect of circumstantial evidence, is as follows:
>
> The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example - 'What it an accident?'.
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> The second passage is as follows:
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> Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or in there some other reasonably possible explanation of those facts?
>
> The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl.
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> In our opinion, these directions are perfectly adequate in a case where the prosecution are relying on circumstantial evidence.
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> There are other grounds of appeal on which the appellant relied and which were discussed during the argument before this court. In our opinion there is no substance in any of them.
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> Although Jenny's body has never been found, there is overwhelming evidence on the record that the appellant murdered her. In our judgment no miscarriage of justice has occurred in this case.

[17] Looking at the provision of the law and evaluation of circumstantial evidence, I cannot say for certain that the cumulative circumstances of the case pointed to the accused having committed the crime.

[18] I say this because one fact which is glaring from the evidence of the Doctor SP7 is that the deceased suffered 18 injuries. This to me gives rise to the inference that the deceased could have suffered these injuries while struggling or even fighting back. This leads to the possibility that she could have been accidentally or unintentionally stabbed by the accused if at all it was the accused who stabbed her.

[19] It is my finding that in this case the circumstantial evidence does not lead to the irresistible conclusion that it was the accused who murdered the deceased.

Non Production Of Weapon Used

[20] The weakness of the circumstantial evidence in this case is further compounded by the fact that the weapon used for the commission of the offence was not tendered as evidence. There was the evidence of the IO that a knife was recovered but no further evidence was led to determine to establish whether this was the knife which caused the death of the deceased.

[21] The evidence of the IO seem to indicate that the knife was recovered with the assistance of the accused but again the IO stated that he and his personnel had to search for the exact location of the knife. It is clear from the evidence that the exact location of the knife was not shown by the accused. Further the photographs clearly show although this was denied by the IO that the knife had to be dug out from under the sand. If the knife was hidden under the sand there is no evidence to show what led the police to dig that particular spot.

Failure To Call The Chemist

[22] More telling in this case is that the doctor conducting the post mortem had handed a number of samples to be analysed and the IO himself had seized certain items from the accused which were in fact sent to the Chemist Department yet the chemist who analysed the exhibits was not called to testify and neither was there proof that the chemist report was served on the accused.

[23] I did not hesitate in this case in invoking an adverse inference against the prosecution under s. 114(g) of the Evidence Act 1950. In doing so I took heed of what was stated in the Federal Court case of *Ghazalee Kassim & Ors v. PP* [2009] 4 CLJ 737 where it was stated as follows:

> The court will only invoke section 114(g) of the Evidence act for failure to call a witness if it is of the opinion that the prosecution does so to withhold or suppress evidence which, if produced could be construed against the prosecution or otherwise in favor of the accused. The prosecution can also in the alternative, offer to the defence any witness which they do not wish to call. As to which witness the prosecution chooses to call is entirely up to them. Calling a wrong witness may be detrimental to their case. The same goes if they fail to call a material witness. This is where s. 114(g) of the Evidence act may be invoked by the Court.

[24] In this case the prosecution failed to explain the non calling of the chemist and surely the chemist being a government servant should be easily available to testify. The prosecution might not necessarily be suppressing or withholding evidence unfavorable to them but in the circumstances of this case where the prosecution was relying on circumstantial evidence the chemist had to be regarded as a material witness.

Failure To Identify The Deceased

[25] The final nail in the prosecution's case in this case was the failure to call the witness who identified the deceased to the Doctor who conducted the post mortem. The IO testified that it was the deceased father who identified the deceased. The father of the deceased was neither called nor offered to the defence.

[26] On identification of the deceased, Hashim J in the case of *Teay Wah Cheong v. PP* [1963] 1 LNS 142 stated thus:

> (a) The identity of the deceased person was not conclusively proved. It is not sufficient for the medical officer to say that he received an injured person from a police corporal and that the patient was Abdul Salam s/o Akob. The medical officer had to state as to where he obtained the name of the injured person unless he knew the injured person personally. The police corporal who took Abdul Salam to the hospital did not say in his evidence that he identified Abdul Salam to the medical officer. There is nothing in the record to show how the medical officer obtained Abdul Salam is name. The

A medical officer stated *inter alia* that the "patient died at 10.30 a.m. the same day" and "I handed the deceased to his relative on same day". In my opinion this is not sufficient to prove identification of the deceased person. The medical officer should have outed clearly that he personally saw the
B dead body of Abdul Salam s/o Akob and that he personally handed the dead body of Abdul Salam to the relative who should have been called for identification by the medical officer. There does not appear to be in the record of proceedings who this "relative" was. The wife of Abdul Salam simply identified her husband to the police on the
C same day the husband died.

[27] For all intents and purposes the identity of the deceased that is the murder victim has not been established in this case.

D **[28]** As a final conclusion I decided that the prosecution had failed to prove a *prima facie* case against the accused and I discharged and acquitted the accused of the charge against him.

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